

**FILED**09/18/19  
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SAN FRANCISCO, CA 94102-3298

September 18, 2019

**Agenda ID #17751**  
**Ratesetting**

## TO PARTIES OF RECORD IN APPLICATION 19-01-014:

This is the proposed decision of Administrative Law Judge Zita Kline. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's October 24, 2019, Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ ANNE E. SIMON

Anne E. Simon

Chief Administrative Law Judge

AES:avs

Attachment

Decision **PROPOSED DECISION OF ALJ KLINE** (Mailed 9/18/2019)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Cox California Telcom,  
LLC (U5684C) Requesting the  
Commission Not Require Cox to Pay  
Disputed Surcharge Amounts  
Identified in Audit Report.

Application 19-01-014

**DECISION REGARDING REQUEST FOR RELIEF FROM SURCHARGES  
AND USER FEES, INTEREST AND PENALTIES PAID  
FOR DIRECTORY LISTING SERVICES**

**Summary**

This Decision dismisses without prejudice the application of Cox California Telcom, Limited Liability Company as procedurally improper. This proceeding is closed.

**1. Factual Background**

The California Public Utilities Commission's (Commission) Utility Audits Division audits carriers for compliance with Public Purpose Program (PPP) surcharges and user fee obligations, among other things.<sup>1</sup> On June 10, 2016, an audit report found Cox California Telcom, Limited Liability Company (Cox or Applicant) underpaid PPP surcharges and user fees on

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<sup>1</sup> Crowe Howarth, LLP (Crowe) is an independent auditor contracted by the Commission's Water and Audits Division to report audit findings on the PPP surcharges and user fees at issue in this application.

directory listing services for fiscal year (FY) 2012-2013 (FY 2012-2013 Audit Report).<sup>2,3</sup> On October 28, 2017, an audit report made similar findings for Cox's FY 2013-2014 and 2014-2015 reported PPP surcharges and user fees (FY 2013-2015 Audit Report) for directory listing services.<sup>4,5,6</sup>

Cox contested the findings of the Audit Reports, and the Utility Audits Division referred the matter to the Commission's Communications Division (CD) for each report. On November 22, 2016, CD sent a demand letter to Cox regarding amounts owed per the FY 2012-2013 Audit Report.<sup>7</sup> On December 23, 2016, Cox paid the disputed amount for FY 2012-2013.<sup>8</sup>

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<sup>2</sup> Crowe, California Telecommunications PPP Surcharge and User Fee Compliance Examination of Cox Communications, dated June 10, 2016, for fiscal year 2012-2013.

<sup>3</sup> This report is also referred to in filings as the "2016 Examination Report" and the "2016 Report."

<sup>4</sup> Crowe, California Telecommunications PPP Surcharge and User Fee Compliance Examination of Cox Communications, dated June 10, 2016, for fiscal year 2014-15.

<sup>5</sup> This report is also referred to in filings as the "2017 Audit Report" and the "2017 Report."

<sup>6</sup> The FY 2012-2013 Audit Report and FY 2013-2015 Audit Report (collectively referred to as "the Audit Reports") made findings of both overcollection and undercollection on several services, which consequently may be referenced in this decision. However, the subject of Cox's application only pertains to directory listing services, and the associated interest and the penalties incurred as a result of underpayment.

<sup>7</sup> CPED Protest, Attach. A at 1-2.

<sup>8</sup> Amended Application at 2.

*Footnote continued on next page.*

On April 5, 2018, CD sent a similar demand letter to Cox regarding amounts owed per the FY 2013-2015 Audit Report.<sup>9</sup> In response to CD's demand letters, Cox disputed the amounts owed and requested reconsideration of the FY 2013-2015 Audit Report by letter dated May 2, 2018.<sup>10</sup> On October 18, 2018, CD responded to Cox's request for reconsideration by affirming its prior demands and directing Cox to remit payment in full within 30 days, indicating CD would refer the matter for enforcement action if the amount remained unpaid.<sup>11</sup> After further correspondence and communication, CD granted Cox an extension of time, until January 22, 2019, to submit the disputed amount.<sup>12</sup>

On January 18, 2019, Cox sent a second request for reconsideration to CD. On February 6, 2019, CD responded to Cox's second request for reconsideration by removing the amount owed for voicemail services, but maintaining directory listing services were subject to PPP surcharges and user fees.<sup>13</sup> CD's letter also instructed Cox to direct any refund request for disputed surcharges and user fees to the Department of General Services Government Claims Program, and determine if any other administrative remedies should be considered.<sup>14</sup> On March 7, 2019, Cox paid the disputed amount for PPP surcharges, user fees, accrued interest and penalties associated with the FY 2013-2015 Audit Report.<sup>15</sup>

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<sup>9</sup> CPED Protest, Attach. A at 3-5.

<sup>10</sup> Amended Application at 6.

<sup>11</sup> *Id.*

<sup>12</sup> Amended Application at 6.

<sup>13</sup> CPED Amended Protest at 2.

<sup>14</sup> CPED Protest, Attach. A at 12-15.

<sup>15</sup> *Id.*; Amended Application at 2.

## **2. Procedural Background**

On January 29, 2019, Cox filed an application requesting the Commission relieve Cox of its obligation to pay the disputed amounts for PPP surcharges and user fees for directory listing services, as well as accrued interest and penalties demanded by CD through informal enforcement action against Cox. Cox disputed the amounts owed for directory listing services on the basis that directory listing services were not intrastate telecommunications services subject to the Commission's jurisdiction.

On March 14, 2019, the Commission's Consumer Protection and Enforcement Division (CPED) filed a protest to the Application. On March 18, 2019, The Utility Reform Network, the Greenlining Institute and the Center for Accessible Technology (Joint Consumers) jointly filed a protest to the Application. In their protests, both CPED and the Joint Consumers generally supported the Commission's authority to collect surcharges and user fees on directory listing services and argued Cox was improperly requesting the Commission reconsider the matter in an application rather than through a petition for rulemaking. On March 28, 2019, Cox filed a response to CPED and the Joint Consumers' protests, stating it did not request a Commission rulemaking but wanted the Commission to review the disputed amounts identified in the FY 2012-2013 Audit Report and FY 2013-2015 Audit Report, and associated interest and penalties.

On March 6, 2019, Administrative Law Judge (ALJ) Kline set a prehearing conference (PHC) by ruling. On April 5, 2019, ALJ Kline held a PHC to discuss the issues of law and fact and determine the need for hearing and schedule for resolving the matter. At the PHC, ALJ Kline informed Cox that the issue in its Application appeared moot, as Cox requested relief from payment of disputed

amounts owed but then subsequently paid the disputed amount. ALJ Kline also informed Cox that the Government Claims Act appeared to be the appropriate remedy for Cox to address their relief, and that ALJ Kline would consider an amended application whereby Cox amended its request for relief to reflect that it paid the disputed amount and also explain why the Government Claims Act was not sufficient and exclusive relief.<sup>16</sup>

On April 19, 2019, Cox filed a motion stating its intent to file a claim under the Government Claims Act and requesting the Commission hold this proceeding in abeyance until Cox received an answer to its claim. On April 23, 2019, ALJ Kline issued an email ruling holding the proceeding in abeyance until June 30, 2019.

On June 28, 2019, Cox filed an Amended Application, wherein Cox requested a waiver from its obligations to pay PPP surcharges and user fees for directory listing services, and a credit on the amounts remitted to the Commission accrued as a result of the Audit Reports. Cox requested waiver on the basis that Cox reasonably believed directory listing services were not intrastate telecommunications services subject to the Commission's jurisdiction. On July 29, 2019, CPED and the Joint Consumers filed Amended protests to the Amended Application.

ALJ Kline held a second prehearing conference on August 15, 2019. At the second PHC, ALJ Kline reiterated that the Amended Application continued to be procedurally improper as Cox requested waiver from CD's informal enforcement actions. ALJ Kline indicated that the next steps in the proceeding would be dismissal by proposed decision and indicated Cox could also motion to

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<sup>16</sup> RT: 7:26-8:4, 10:1-10.

*Footnote continued on next page.*

withdraw their application, which Cox considered but ultimately decided against.<sup>17</sup>

### **3. Cox's Application Requesting Review of CD's Informal Enforcement Action is Procedurally Improper**

When evaluating an application, we must assess whether it is properly before the Commission. The Commission administers California's universal service programs, which include its six PPPs,<sup>18</sup> and CD oversees carrier's compliance with these programs. In this capacity, CD reviews carrier's submissions of PPP surcharges and user fees, as well as other compliance filings. In the event of carrier noncompliance with PPP rules and requirements, CD may take formal enforcement action by issuing a citation<sup>19</sup> or preparing a resolution. If CD issues a citation, it may be reviewed through a citation appeal proceeding, which is an expedited adjudicatory proceeding.<sup>20</sup> If CD mails a draft resolution, the Commission considers the matter without opening a formal proceeding and may adopt the resolution. CD may also refer the matter to CPED to issue an Order Instituting Investigation, which opens a formal adjudicatory proceeding to consider a formal enforcement action.

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<sup>17</sup> Cox email titled "A 19-01-014 - Response Per PHC," dated August 23, 2019.

<sup>18</sup> See Pub. Util. Code § 270.

<sup>19</sup> See Resolution T-17601.

<sup>20</sup> See Resolution ALJ 299.

In this case, CD took only informal enforcement actions against Cox in the form of demand letters and Cox paid the disputed amounts. Upon consideration, we find this application is not the correct procedural vehicle to review Cox's appeal, as review would circumvent and undermine the Commission's existing enforcement and appeal process. The Commission recently dismissed a similar application in Decision (D.) 18-11-028,<sup>21</sup> finding the application premature and procedurally improper. Similarly, we find Cox's application procedurally improper. Unlike GoGo Technology, Incorporated's (GoGo) request in Application (A.) 18-06-011, however, Cox's payment of the disputed amounts may preclude formal Commission action subsequent to this decision. Therefore, Cox's request for relief from disputed amounts paid to the Commission, absent formal Commission action, is properly addressed through the Government Claims Act.

Since we conclude that Cox's motion is not properly before the Commission, the Commission does not consider or reach any conclusions about the merits of substantive arguments raised by Cox, CPED or the Joint Consumers. This application is dismissed without prejudice.

#### **4. Motions to Seal and Other Procedural Matters**

Pursuant to Rule 11.5, portions of the record (such as market-sensitive information) may be sealed. Cox requests confidential treatment of Attachments D and E of its Amended Application, dated June 28, 2019. The documents contain financial information related to Cox's payments of surcharges and user fees owed. The annual surcharge and user fee information can be used

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<sup>21</sup> In A.18-06-011, GoGo requested a Commission order declaring GoGo was not a regulated entity and for an order to stay a pending enforcement action.

*Footnote continued on next page.*



to calculate Cox's annual revenue. The Commission has granted confidential treatment of this information in the past as market-sensitive information<sup>22</sup> and we do so now.

Cox's motion to treat as confidential and seal (as detailed in the ordering paragraphs herein) portions of Cox's Amended Application is granted. The aforementioned documents shall remain under seal for three years, which is the applicable period of time set forth for market-sensitive information. For all sealed documents, Cox may make a motion to extend the period of confidential treatment prior to its expiration. Once the period has expired, the documents and information may be made available to the public on request pursuant to General Order 66-D.

All rulings issued by the assigned Commissioner and ALJ are affirmed herein; and all motions not specifically addressed herein or not previously addressed by the assigned Commissioner or ALJ, are denied.

## **5. Categorization and Need for Hearing**

In Resolution ALJ 176-3433, issued on February 21, 2019, the Commission preliminarily categorized this application as ratesetting and preliminarily determined that hearings were necessary. Given the Commission's decision to dismiss this application as improperly before the Commission, hearings are not necessary.

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<sup>22</sup> D.15-05-032, Appendix A at 49 (finding that revenue numbers are commercially sensitive, confidential information); D.99-07-048 at 25-26 (finding that financial and customer base information is commercially sensitive information), D.02-10-061 at 6-7 (finding Commission staff report should be filed as a confidential and public version to "preserve the confidentiality and competitively sensitive information, such as the financial and customer base information of competitive local exchange carriers and the number of lines those carriers were serving").

## **6. Comments on Proposed Decision**

The proposed decision of ALJ Kline in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

## **7. Assignment of Proceeding**

Genevieve Shiroma is the assigned Commissioner and Zita Kline is the assigned Administrative Law Judge in this proceeding.

## **Findings of Fact**

1. CD took informal enforcement action against Cox as a result of disputed amounts resulting from the Audit Reports, consisting of demand letters.
2. Cox paid the disputed amount incurred as a result of the FY 2012-2013 Audit Report on approximately December 23, 2016.
3. Cox paid the disputed amount incurred as a result of the FY 2013-2015 Audit Report on March 7, 2019.
4. The Commission has not taken formal action against Cox related to disputed amounts incurred for Cox's past undercollection of PPP surcharges and user fees on directory listing services, as determined in the Audit Reports.

## **Conclusions of Law**

1. CD manages and reviews carrier compliance with the Commission's six PPP programs, as identified in Section 270 of the Public Utilities Code.
2. CD can take informal enforcement action for carrier noncompliance prior to pursuing formal enforcement actions against a carrier.
3. CD can take formal enforcement action by issuing a resolution or a citation.

4. CD can refer an informal enforcement action to CPED, who may initiate a formal Commission action through an Order Instituting Investigation.

5. A citation appeal may be filed pursuant to Resolution ALJ-299.

6. Commission review of an informal enforcement action by ratesetting application is procedurally improper and may also be premature.

7. Claims for money or damages against the state can be filed with the Department of General Services pursuant the Government Claims Act, as detailed in Section 905.2 of the California Government Code.

## **O R D E R**

### **IT IS ORDERED** that:

1. Cox California Telcom, Limited Liability Company's application is dismissed without prejudice.

2. Cox California Telcom, Limited Liability Company's (Cox) request to treat as confidential Attachment D and E of its Amended Application are granted for a period of three years from the date of this order. During this three-year period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Cox believes it is necessary for this information to remain under seal for longer than three years, it may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

3. All rulings issued by the assigned Commissioner and Administrative Law Judge (ALJ) are affirmed herein; and all motions not specifically addressed herein or not previously addressed by the assigned Commissioner or ALJ, are denied.

4. The determination made in Resolution ALJ 176-3433 that hearings are necessary is changed to no hearings necessary.

5. Application 19-01-014 is closed.

This order is effective today.

Dated \_\_\_\_\_, at Redding, California.